RMC Constructors, Inc. *and* Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers' International Association. Case 28-CA-6639

8 July 1982

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

Upon a charge filed on 18 September 1981 by Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers' International Association, herein called the Union, and duly served on RMC Constructors, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on 18 May 1982 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Respondent failed to file an answer to the complaint.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent violated Section 8(a)(5), (3), and (1) by refusing to execute an agreed-upon collective- bargaining agreement, by refusing to honor and abide by the terms of that agreement, by unilaterally subcontracting unit work, and by discharging employees.

By a letter dated 13 September 1982 counsel for the General Counsel advised Respondent that the Region had not received Respondent's answer to the complaint. It further informed Respondent that unless an answer was received forthwith there would be a recommendation that a motion be filed with the Board for summary judgment in the matter. There was no response to the letter.

On 15 October 1982 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 20 October 1982 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent filed no response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint served on Respondent stated that, unless an answer was filed within 10 days from the service thereof, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." As noted above, Respondent has not filed an answer to the complaint, nor has it responded to the Notice To Show Cause. No good cause to the contrary having been shown, in accordance with the rule set forth above, the allegations of the complaint are deemed admitted and found to be true. Accordingly, we grant the Motion for Summary Judgment.[1]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times, Respondent has been a Colorado corporation and has maintained a facility at 1855 West Union Avenue, Englewood, Colorado, where it is engaged in business as a roofing contractor in the building and construction industry.

During the calendar year ending 31 December 1981, a period representative of Respondent's general operations, Respondent provided services within the State of Arizona valued in excess of $50,000 for Forrest City Dillon, Inc., herein called FCD. FCD, in turn, during the relevant period, purchased and received at its Tucson, Arizona, job-

[1] In granting the General Counsel's Motion for Summary Judgment, Chairman Dotson specifically relies on the total failure of Respondent to contest either the factual allegations or the legal conclusions of the General Counsel's complaint. Thus, the Chairman regards this proceeding as being essentially a default judgment which is without precedential value.

site products, goods, and materials valued in excess of $50,000 directly in interstate commerce from suppliers located in States of the United States other than the State of Arizona.

On the basis of the foregoing, we find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers' International Association, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

At all times material herein, FCD engaged Respondent as its roofing subcontractor at the Tucson Mall jobsite referred to above, which required Respondent to perform, *inter alia*, certain sheet metal work. In furtherance of its subcontract, Respondent, on or about 14 July 1981,[2] and thereafter, requested the Union to refer sheet metal workers from the Union's hiring hall to Respondent to be employed at the Tucson Mall jobsite. On or about 14 July, and thereafter, the Union, pursuant to Respondent's request, referred sheet metal workers to Respondent from its hiring hall who were then hired by Respondent. At all times material herein, all of the sheet metal workers referred to Respondent by the Union from its hiring hall and thereafter employed by Respondent at the Tucson Mall jobsite were members of, and/or represented for the purposes of collective bargaining by, the Union.

All journeymen and apprentice sheet metal workers employed by Respondent at the Tucson Mall jobsite at Tucson, Arizona, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On or about 27 July, and again on or about 29 July, Respondent agreed to abide by, and be bound to, all of the terms and provisions of the then currently effective collective-bargaining agreement between the Sheet Metal and Air-Conditioning Contractors of Southern Arizona and the Union, effective for the period from 1 July 1980 through 1 July 1982, herein called the Local 359-Tucson Agreement, covering the employees of Respondent in the unit described above. Respondent further agreed to execute a written agreement binding it to the Local 359-Tucson Agreement.

[2] All subsequent dates herein are in 1981 unless otherwise indicated.

At all times material herein, the Union has been the exclusive representative under Section 9(a) of the Act of the employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since on or about 27 July Respondent has failed and refused to execute the Local 359-Tucson Agreement, pursuant to the Union's request that it do so, and has failed and refused to honor and abide by the terms and provisions of that agreement.

From on or about 27 July to on or about 29 July the unit employees of Respondent ceased work concertedly and engaged in a strike.

On or about 31 July Respondent discharged all of the unit employees and, at all times since 29 July, has failed and refused to reinstate said employees to their former positions with Respondent. Respondent terminated its employees and failed and refused to reinstate them because of their union and other protected concerted activities, including, but not limited to, engaging in a work stoppage and strike on or about 27 July to on or about 29 July.

On or about 31 July Respondent subcontracted the sheet metal work being performed by its employees to another employer without prior notice to the Union and without having afforded the Union an opportunity to negotiate and to bargain with respect thereto.

On the basis of the foregoing, we find that by refusing to execute the agreed-upon collective-bargaining agreement, by refusing to honor and abide by the terms of that agreement, by unilaterally subcontracting unit work, and by discharging its employees and failing and refusing to reinstate them, Respondent has violated Section 8(a)(5), (3), and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act,

we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we have found that Respondent failed to execute the contract agreed upon by the parties and subcontracted sheet metal work to another employer without giving the Union the opportunity to negotiate and bargain with respect thereto in violation of Section 8(a)(5) and (1) of the Act. We have also found that Respondent terminated its employees because they supported the Union in violation of Section 8(a)(3) and (1) of the Act. In order to dissipate the effects of these unlawful actions, we shall order Respondent to execute the agreed-upon collective-bargaining agreement and to restore the *status quo ante* by restoring the work of unit employees. Respondent shall recall the terminated employees and offer to reinstate them to the positions they held before their unlawful terminations, or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. Respondent shall make its employees whole by paying them backpay for any loss of wages and other benefits which resulted from Respondent's unfair labor practices. Backpay shall be computed in accordance with the formula stated in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

In addition, Respondent shall make whole its employees by making any trust payments which may be required under the terms of the collective-bargaining agreement,[3] and by reimbursing its employees for any expenses ensuing from Respondent's unlawful failure to make such required payments, as set forth in *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corp., supra.*[4]

[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of the funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[4] We recognize that, because of the nature of the construction industry, the facts of this case may present issues concerning the proper application of the remedy adopted herein. The resolution of such issues may appropriately be left to the compliance stage of the proceeding.

CONCLUSIONS OF LAW

1. RMC Constructors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers' International Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. All journeymen and apprentice sheet metal workers employed by Respondent at the Tucson Mall jobsite at Tucson, Arizona, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees of Respondent in the appropriate unit, by refusing to execute the agreed-upon collective-bargaining agreement between the parties, by refusing to honor and abide by the terms of that agreement, and by unilaterally subcontracting unit work without affording the Union an opportunity to negotiate and bargain with respect thereto, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

5. By terminating its employees and by failing and refusing to reinstate them because they supported the Union, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of rights guaranteed them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, RMC Constructors, Inc., Englewood, Colorado, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers'

International Association, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All journeymen and apprentice sheet metal workers employed by Respondent at the Tucson Mall jobsite at Tucson Arizona, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Refusing to execute an agreed-upon collective-bargaining agreement with the Union, refusing to abide by the terms of that agreement, and unilaterally subscontracting unit work.

(c) Discharging and failing and refusing to reinstate employees because they support the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Execute the agreed-upon collective-bargaining agreement and honor, abide by, and apply the terms and conditions of employment provided by that agreement to its Tucson Mall jobsite.

(c) Restore the previous method of operations at the Tucson Mall jobsite.

(d) Recall the terminated employees and offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of wages and other benefits resulting from Respondent's discrimination against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(e) Make whole the employees in the appropriate unit by transmitting any payments owed to the benefit funds if such funds are established by the terms of its collective-bargaining agreement with the Union, and by reimbursing unit employees for any expenses ensuing from Respondent's unlawful failure to make such required payments, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Tucson Mall jobsite in Tucson, Arizona, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sheet Metal Workers' Local Union No. 359, Sheet Metal Workers' International Association, as the exclusive representative of the employees in the following appropriate unit:

> All journeymen and apprentice sheet metal workers employed at our Tucson Mall jobsite at Tucson, Arizona, excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to execute the agreed-upon collective-bargaining agreement with the Union, refuse to abide by the terms of that agreement, or unilaterally subcontract unit work.

WE WILL NOT discharge and fail and refuse to reinstate employees because they support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL execute the agreed-upon collective-bargaining agreement and honor, abide by, and apply the terms and conditions of employment provided by that agreement to our Tucson Mall jobsite.

WE WILL restore our previous method of operation at the Tucson Mall jobsite.

WE WILL recall the terminated employees and offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole, with interest, for any loss of earning and other benefits suffered by reason of the discrimination practiced against them.

WE WILL make whole the employees in the appropriate unit by transmitting any payments owed to the trust funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees, plus interest, for any expenses ensuing from our lawful failure to make such required payments.

RMC CONSTRUCTORS, INC.